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No. 91-1976

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

FEATHERLITE PRECAST CORPORATION ..... *Petitioner*

vs.

JAMES C. PLEDGER, DIRECTOR,
DEPARTMENT OF FINANCE AND
ADMINISTRATION, STATE OF ARKANSAS,
and JIMMIELOU FISHER LUMPKIN,
TREASURER OF THE STATE OF ARKANSAS ..... *Respondents*

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

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ARKANSAS LEGISLATIVE DIGEST, INC

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

Respondents respectfully request that this Court deny Petitioner's petition for writ of certiorari seeking review of the opinion of the Arkansas Supreme Court.

REASONS FOR DENYING THE PETITION

The Arkansas Supreme Court's decision in this case does not conflict with any decision of this Court or any other state appellate court. The court correctly held that the Arkansas Revenue Division's interpretation of the Arkansas sales and use taxes conforms to the requirements of both the Commerce Clause and Equal Protection Clause.

Petitioner, an out-of-state producer of precast concrete components (commonly referred to as a "precaster"), challenged a use tax assessment contending that the tax should have been calculated based upon the cost of raw materials used in producing the components, rather than upon the "sales price" of the finished component. The tax was assessed based upon the "sales price" of the finished component because the component produced was "tangible personal property," and sales and use tax are calculated based upon the "sales price" of tangible personal property. Regardless of whether the precast concrete component is made within the state or without, the same amount of tax is due.

Petitioner predicates his argument upon the presumption that the precasters are in competition with contractors who build structures on-site similar to those made from the precast concrete components. Contractors are deemed to be the consumer of all materials used in construction and therefore pay tax on the "sales price" of all materials used in the construction. If the contractor pours the structure "on-site" then the tax is calculated based upon the "sales price" of the cement, sand, gravel, etc. used in building the structure. If the contractor uses precast concrete components, then the tax is calculated based upon the "sales price" of the precast concrete components, regardless of whether he subcontracts with the precaster-vendor to erect those components. The

precasters provide the subcontractors with a product, precast concrete components, and in some instances provide the contractor with a service, the erection of those components. Precasters do not compete with the contractors. They work on different market levels.

The Arkansas Supreme Court correctly concluded that the application of the sales and use tax in this case conforms with the requirements of both the Equal Protection Clause and the Commerce Clause. All precasters within the state and without are taxed identically. All contractors within the state and without are taxed identically. Precasters do not compete with contractors. Therefore, the Petition for a Writ of Certiorari in this case should be denied.

I.

THE ARKANSAS SUPREME COURT PROPERLY APPLIED THE COMMERCE CLAUSE IN THIS CASE, FINDING THAT THE ARKANSAS SALES AND USE TAXES ARE EQUALLY APPLIED TO IN-STATE AND OUT-OF-STATE TAXPAYERS WHO ARE SIMILARLY SITUATED.

A. Equality of Taxation.

The determination of whether a tax unconstitutionally burdens interstate commerce can be distilled to one question. Does the tax afford equal treatment for in-state and out-of-state taxpayers who are similarly situated? ***Halliburton Oil Well Cementing Co. v. Reily,*** 373 U.S. 64, (1963). The Petitioner admits that all producers of precast concrete components (commonly referred to as "precasters"), such as itself, are subject to a uniform tax burden regardless of

whether they reside within or without the State of Arkansas. (R. 38 and 195) Neither in-state nor out-of-state precasters have a tax advantage. The tax liability for precasters, whether located within the state or without, is calculated in the same manner, using the "sales price" of the concrete components. Arkansas sales and use taxes are equally applied to similarly situated in-state and out-of-state taxpayers.

Petitioner asserts that the taxpayers in this case who are "similarly situated" are the out-of-state construction contractors who use the "precast" method of construction and the in-state construction contractors who use the "poured in place" method of construction. However, Petitioner fails to mention that the in-state and out-of-state construction contractors who use the "precast" method of construction are taxed the same, and that the in-state and out-of-state construction contractors who use the "poured in place" method of construction are also taxed the same. (R. 195-196)

Petitioner has not challenged any statutory provision, but instead has challenged the taxing authority's "administrative practice." (Pet. 14 and 17) The Arkansas Supreme Court found that the Arkansas Revenue Division had correctly interpreted the statutes, noting:

> Appellee Featherlite admits that the Revenue Division's interpretation is literally correct, but urges us to hold that the General Assembly intends for the Division to use a more "flexible" interpretation. . . . But we need not consider other "flexible" interpretations because the statutes are not ambiguous and the Revenue Division's interpretation of them is in accordance with their plain and accepted meaning. (Pet. A. 10a)

Reciting the pertinent provisions of the applicable sales and use tax statutes[1], the Court sustained Respondent's

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[1]Ark. Code Ann. §26-52-301 (1987), in pertinent part, provides:

There is levied an excise tax of three percent (3%) upon the gross proceeds or gross receipts derived from all sales to any person of the following:

(1) *Tangible personal property;*

[Emphasis added.]

Ark. Code Ann. §26-52-103 (1987), in pertinent part, provides:

(a) The following words and phrases, except where the context clearly indicates a different meaning when used in this act, shall have the following meanings:

(3)(A) "Sale" is declared to mean the transfer of either the title or possession . . . for a valuable consideration of *tangible personal property*, regardless of the manner, method, instrumentality, or device by which the transfer is accomplished. [Emphasis added.]

• • •

(4) "Gross receipts" or "gross proceeds" means the total amount of consideration for the sale of tangible personal property . . . without any deduction on account of the cost of the properties sold, labor service performed, interest paid, losses, or any expenses whatsoever.

• • •

(7) "Seller" means every person making a sale in an established business as defined in this section;

• • •

(9) "Consumer" or "user" means the person to whom the taxable sale is made or to whom taxable services are furnished. All contractors are deemed to be consumers or users of all tangible personal property including materials, supplies, and equipment used or consumed by them in performing any contract, and the sale of all such property to contractors are taxable sales within the meaning of this act.

Ark. Code Ann. §26-52-307 (1987) provides:

Sales of service and tangible personal property including materials, supplies, and equipment made to contractors who use them in the performance of any contracts are declared to be sales to consumers or users and not sales for resale.

interpretation of those statutes and found that the sales and use tax due on the sale of precast concrete components is correctly calculated based upon the "sales price" charged, rather than the cost of the raw materials, since the concrete components are "tangible personal property."

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[1]Continued

Ark. Code Ann. §26-53-106(a) (1987) provides:

There is levied and there shall be collected from every person in this state a tax or excise for the privilege of storing, *using*, or consuming within this state any article of tangible personal property purchased for storage, use or consumption in this state at the rate of three percent (3%) of the sales price of the property. [Emphasis added.]

Ark. Code Ann. §26-53-102 (1987) in part provides:

As used in this subchapter, unless the context otherwise requires:

(1) "Sales price" means the consideration paid, or given . . . to the vendor for the article of the tangible personal property . . . without any deduction therefrom on account of the cost of the property sold, the costs of the materials used, labor or service cost, . . . or any other expenses whatsoever. . . .

(4) "Vendor" means and includes every person engaged in making sales of tangible personal property. . . .

(11) *"Tangible personal property" means personal property which may be seen, weighed, measured, felt, touched, or is in any other manner perceptible to the senses.* [Emphasis added.]

Ark. Code Ann. §26-53-201 (1987) provides:

As used in this subchapter, unless the context otherwise requires, "contractors" are consumers of all tangible personal property used or consumed in the performance of a contract in this state and of all tangible personal property stored for use or upon which the contractor may exercise any right or power in this state.

Ark. Code Ann. §26-53-203(a)(1) (1987) provides:

All tangible personal property which is procured from without this state for use, storage, or consumption including machinery, equipment, repair or replacement parts, materials, and supplies used, stored, or consumed by a contractor in the performance of a contract in this three percent (3%) of the purchase price as provided by the Arkansas Compensating Tax Act, §26-53-101 et seq. . . .

The tax due on the sale of precast concrete components is the same under all circumstances, regardless of whether sales or use tax is imposed. It makes no difference whether the general contractor purchases the precast concrete components and erects them himself, or hires the precaster, such as Petitioner, to erect them. The tax (sales or use) will be calculated based upon the "sales price" of the precast concrete components, less the separately stated erection charges, if any. (R. 195-196) The "sales price" is the correct basis to use for calculating the tax due because precast concrete components are "tangible personal property". Ark. Code Ann. §§26-52-301 and 26-53-106. The same amount of tax is due, regardless of where the seller or purchaser resides.

Unlike *Halliburton,* 373 U.S. 64 (1963), the tax in this case is not dependent upon whether the taxpayer resides within or without the state. In *Halliburton,* the out-of-state manufacturer-user was required to pay use tax based upon the "cost price" which included the labor and shop overhead costs, whereas the in-state manufacturer-user was only required to pay sales tax based upon the cost of the raw materials which was substantially less than the "cost price". The Louisiana Collector stipulated that had Halliburton assembled the equipment in Louisiana, the tax would have been calculated based upon the cost of the raw materials instead of the "cost price" of the finished product. Accordingly, this Court found that the Louisiana use tax unconstitutionally discriminated against interstate commerce. In the case at bar, the same amount of tax is due on the sale of a precast concrete component regardless of whether the purchaser or the seller resides within or without the State of Arkansas. Therefore, the *Halliburton* case is not analogous to this case.

B. *No Conflict With Decisions In Other States.*

The Arkansas Supreme Court decision in this case does

not conflict with any decision of the other state appellate courts including the Louisiana Supreme Court's decision in *Chicago Bridge and Iron Company v. Cocreham*, 317 So.2d 605 (La. 1975). Petitioner inaccurately portrays the facts of this case as being "virtually identical with and indistinguishable from" the facts in *Chicago Bridge and Iron.* (Pet. 20)

Chicago Bridge and Iron (CBI) was an Illinois corporation doing business in Louisiana constructing steel storage tanks which were assembled on foundations at the job site. CBI fabricated the steel plate components of the storage tanks at its out-of-state shops and transported them to the Louisiana job sites. Louisiana assessed the use tax due on the "cost price" of the fabricated steel plates, which included not only the cost of the steel plate but also the labor and shop overhead costs incurred in the out-of-state fabrication.

The question before the Louisiana Supreme Court was as follows:

> The narrow question we are here considering is whether under Louisiana law the in-state purchaser who, in performing his construction contracts, in part fabricates or manufactures off-site at his in-state plant, is required to pay, in addition to the sales tax on the raw materials purchased, in-state, a use tax on the labor and shop overhead which goes into fabrication of such equipment. *Chicago Bridge and Iron*, 317 So.2d at 610.

Based upon the Louisiana Collector's stipulation in the *Halliburton* case that neither sales nor use tax would be due upon the in-state labor or shop overhead, the Louisiana Supreme Court found that "the use tax is imposed upon labor and shop overhead of the out of state manufacturer-user and that neither sales nor use tax is imposed upon the in-state

manufacturer-user," and concluded that the application of the use tax to labor and shop overhead of the out-of-state manufacturer-user is unconstitutional because it violates the Commerce Clause of the United States Constitution. *Chicago Bridge and Iron*, 317 So.2d at 612.

Unlike CBI, Petitioner in this case is on equal footing with his in-state competitors, the in-state producers of precast concrete components. Whereas CBI's in-state competitors who fabricated the steel plate components off-site had a lower taxable base (the cost of the raw materials as opposed to the enhanced value or "cost price"), Petitioner's in-state competitors who produce the precast concrete components off-site have the same taxable base as Petitioner (the "sales price" of the concrete components). Petitioner does not dispute the fact that both in-state and out-of-state precasters, such as Petitioner, are all required to collect Arkansas sales or use tax based upon the "sales price" of the finished precast concrete components. (R. 117) Therefore, *Chicago Bridge and Iron* is distinguishable from this case.

C. *Similarly Situated Taxpayers.*

Petitioner's argument is conditioned upon the presumption that the precasters who make and sell these components, and sometimes erect them, are in competition with the general contractors who build similar concrete structures on-site using the "poured-in-place" or "tilt-up" method of construction. The whole basis for Petitioner's argument is that the end product is the same. However, there is a fundamental distinction between the precasters and the general contractors.

Petitioner and the other precasters do not compete with the general contractors for the same jobs. Petitioner and the other precasters, in fact, sell to the general contractors.

The general contractors who hire the Petitioner to provide the concrete components are actually the competitors of the general contractors who use the on-site construction methods.

The general contractor makes the business decision of whether to purchase precast concrete components from a precaster, such as Petitioner, or to use one of the on-site construction methods, "poured-in-place" or "tilt-up". Undoubtedly, this decision will have significant tax consequences. Arkansas law clearly requires the contractor to pay sales or use tax on all of the materials used by the contractor. Accordingly, the more the contractor spends on his materials (precast concrete components or sand, gravel and cement) the more tax he pays. Therefore, in the end, it is the general contractor's business decision whether to use precast concrete components or to use one of the on-site construction methods.

The affidavits of two of Petitioner's witnesses, both of which are presidents of companies which produce precast concrete components, explain why a general contractor may choose to use precast concrete components rather than pouring the concrete structure "on-site". Both witnesses stated: "Several of the reasons why our products are chosen is because the concrete can be pre-stressed in our process to make it stronger and the concrete structure can be assembled more quickly 'on-site', thus saving overall construction time." (R. 230 and 234) Based upon the strength and the time considerations, in some cases the general contractor might be instructed to use precast concrete components rather than to pour the concrete structure "on-site".

The Arkansas Supreme Court correctly found that Petitioner, an out-of-state producer of precast concrete components, is more "similarly situated" to the in-state producers of precast concrete components than to the in-state general contractors. Finding that there was no violation

of the Commerce Clause the Court stated:

> The sales and use taxes at issue are not imposed in a way that creates an inequity between in-state and out-of-state taxpayers. The residence of the precast company has no bearing upon the amount of taxes it pays. The Revenue Division imposes both sales and use taxes upon the price of the concrete components regardless of whether they are precast within or without the state. Thus there is equal treatment for similarly situated in-state and out-of-state taxpayers in the imposition of taxes, and as a result, there is no violation of the commerce clause. (Pet. A. 11a)

This decision conforms with the requirements of the Commerce Clause and does not conflict with any decision of this Court or any decision of the other state appellate courts. Therefore this petition for a Writ of Certiorari should be denied.

II.

THE ARKANSAS SUPREME COURT CORRECTLY HELD THAT THE CLASSIFICATION OF PRODUCERS OF PRECAST CONCRETE COMPONENTS AS VENDORS AND THE CLASSIFICATION OF GENERAL CONTRACTORS AS CONSUMERS FOR TAX PURPOSES DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE U. S. CONSTITUTION.

The Fourteenth Amendment of the U.S. Constitution permits the states to classify taxpayers for tax purposes, provided that there is a "rational basis" for the classifications. Petitioner readily admits:

> These classifications will be presumed constitutional and

> approved if the legislative action advances a legitimate state purpose and the resulting classifications are reasonably related to the state purpose; the classifications do not have to be drawn with mathematical precision; and, finally, a heavy burden of proof is placed upon the challenging taxpayer to establish that the questioned classifications are palpably arbitrary and do not advance a legitimate state purpose. See *Allegheny Pittsburg Coal Company v. County Commissioner*, 488 U.S. 336 (1989); *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356 (1973); *Allied Stores of Ohio v. Bowers*, 358 U.S. 522 (1959); *Madden v. Kentucky*, 309 U.S. 83 (1940); and *Carmichael v. Southern Coal Company*, 301 U.S. 532 (1937). (Pet. 24)

For Arkansas sales and use tax purposes taxpayers are classified based upon their status either as a vendor or consumer. Petitioner and other precasters are considered vendors of tangible personal property, i.e. precast concrete components. General contractors are considered consumers of construction materials, i.e. precast concrete components or sand, gravel and cement. The question is whether this is a reasonable classification.

Precasters, such as Petitioner, are classified as vendors because they produce and sell precast concrete components, "tangible personal property." Although the precasters in some instances erect these concrete components for the contractor/consumer, that does not negate the fact that there has been a sale of tangible personal property. Precasters are supplying raw material in the form of precast concrete components to the contractor. Robert T. Dolson, Vice-President of Finance for Featherlite Precast Corporation (Petitioner), attested to this fact in his affidavit stating: ". . . Featherlite acts in the role of a supplier of raw materials to the subcontractor or the general contractor." (R. 266)

Mr. Dolson's statement endorses the classification of Petitioner as a vendor. However, Mr. Dolson's statement contradicts the representation by Petitioner in the Statement of Facts that "Neither Featherlite nor the other precasters made any sales of raw materials (e.g. building supplies) to the general contractors. . . ." (Pet. 6)

General contractors are deemed to be consumers or users of all tangible personal property used or consumed in construction. Ark. Code Ann. §26-52-103(9). As consumers, general contractors are required to pay tax based upon the "sales price" of items purchased. If a general contractor purchases precast concrete components, tax is due based upon the total price paid for the components, regardless of whether he or a subcontractor erects those components.

Neither Petitioner nor other precasters competes with the general contractors. The general contractors bid against each other for the construction contract. Whereas, Petitioner bids against the other precasters for the contract to provide the general contractors with precast concrete components. There is no competition between the precasters and the general contractors, even when the precaster is bidding to erect the precast concrete components, because the precasters' bids are submitted to the contractor and the contractors' bids are submitted to the property owner, the ultimate consumer. The precasters and the general contractors operate on two different market levels.

The State has a legitimate interest in the collection of taxes. All precasters, whether in-state or out-of-state, are classified as vendors and taxed identically. All general contractors, whether in-state or out-of-state, are classified as consumers and taxed identically. This application of the sales and use tax laws based upon their status as either vendor or consumer affords both the precasters and the contractors

equal protection under the law, as guaranteed by the Fourteenth Amendment of the U.S. Constitution. Therefore, Respondents respectfully submit that this Court should deny the Petition for a Writ of Certiorari.

CONCLUSION

For the reasons stated above, this Court should deny Petitioner's Petition for Writ of Certiorari.

Respectfully submitted,

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